



**Kaluworks Limited v Kenga (Appeal E159 of 2024)
[2025] KEELRC 1326 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1326 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E159 OF 2024**

K OCHARO, J

MAY 8, 2025

BETWEEN

KALUWORKS LIMITED APPELLANT

AND

CHENGO KARISA KENGA RESPONDENT

JUDGMENT

1. This is an appeal by Kaluworks Limited, the Appellant, against the judgment of the learned Principal Magistrate Hon. G. SOGOMO delivered in Mombasa CMELRC No. 234 of 2019 on 28th June 2024.
2. The Respondent entered into employment with the Appellant on or about 16th July 2009, as a Casting Operator. His duties, among others, included making spouts.
3. He typically worked six days a week but could sometimes work continuously.
4. On 12 April 2017, Joel Mwangi, the Department head, informed him that his employment had been terminated because of diminished work.
5. The termination was unlawful, abrupt, and contravened the provisions of *the Constitution* of Kenya, 2010, the rules of natural justice, labour laws, and the stipulations of International Labour Conventions. He was not provided with a fair and valid reason for the termination. He received no notice whatsoever prior to the termination, nor was he allowed an opportunity to make a representation regarding the matter.
6. He was not registered under a pension scheme or a provident fund under the *Retirement Benefits Act*, a gratuity service, or a service scheme established under a Collective Bargaining Agreement, the National Social Security Fund or any other Scheme established by the Respondent. Accordingly, he was entitled to service pay.
7. He consequently sought the following reliefs against the Appellant;



1. One month's notice pays, at Kshs. 21,300.
 2. Accumulated leave days, at Kshs. 176,790.
 3. Severance pay, at Kshs. 85,200.
 4. Underpayment, at Kshs. 849,132.
 5. Maximum compensation for wrongful dismissal and unlawful termination as per Section 49 and 50 of the *Employment Act*, at Kshs. 255,600.
 6. An order compelling the Respondent to issue the Claimant with a Certificate of Service.
 7. Costs of the cause.
 8. Interest on prayer 1, 2, 3, 4 and 5 from the date of filing of this cause and on prayer 8 from the date of Judgment until payment in full.
8. The Appellant, on its part, through its witness, Hezron Rachilo, stated that the Respondent was employed as a Casual Labourer as a Spouts Casting Workman responsible for manually casting spouts from molten aluminium in the Spouts Foundry Department.
 9. At the time of joining the Appellant's employment, the Respondent was a casual labourer earning approximately KShs. 219-276 per day, a sum that included a housing allowance. The wages were hugely dependent on the number of spout pieces produced. He was paid on piece rates.
 10. The Respondent did not work on a monthly basis or continuously, as there were several days when he failed to report to work. The Respondent had a history of indiscipline. He was in the habit of absenting himself from duty without authority and disobeying lawful directives.
 11. On 9th March 2017, the Appellant asked all its employees to provide contact details as part of the employee's information to be maintained by it. This instruction was relayed through an internal memo dated 9th March 2017. The deadline for submission of the details was set as 20th March 2017.
 12. Despite receiving the memo, the Respondent refused to acknowledge receipt of it and supply the information within the set period. After numerous follow-ups, he gave unclear details, and despite the Appellant's demand that he provide clear information and his undertaking to do so, he failed to.
 13. On 7 April 2017, the Appellant issued the Respondent a show-cause letter that required him to explain why disciplinary action couldn't be taken against him for failing to obey lawful instructions. He received the show-cause letter on 10 April 2017, in the presence of the respondent's security supervisor. However, he refused to acknowledge receipt.
 14. The show cause letter instructed him to respond within 48 hours of receipt, but he refused to. This despite the fact that the Appellant had warned through the letter that the infraction he was accused of could lead to summary dismissal.
 15. The Respondent reported to work as usual on 12th April 2017 and worked his shift till 14.00 hours as scheduled before clocking out from the Appellant's premises.
 16. Due to the Appellant's operational exigencies, the Respondent was advised to take 30 days of paid leave from 13 April 2017 to 20 May 2017. A leave form was prepared for this purpose, but the Respondent refused to sign it.
 17. The Respondent was still entitled to earn daily wages during the leave period. At the end of the leave days, the Respondent failed to resume his duties. He was well aware that his shifts were scheduled from



22nd May 2017. He continued to be absent without authority or a valid cause known to the Appellant to date.

18. It isn't true that his employment was terminated as he alleged.
19. On 29 April 2017, the Appellant prepared a written show cause requiring the Respondent to explain his absence from duty. The letter could not be served because he had not supplied the contact details as demanded of him.
20. On 5th May 2017, the Appellant notified the County Labour Office pursuant to the provisions of Section 78 of the *Employment Act* that the Respondent had continuously been absent from work and that it had presumably terminated his employment.
21. It was stated further that the Respondent was entitled to one rest day after every six days of work. The manpower plan and his attendance records for March 2017 are a testament. Further, to fully paid leave for the period he was away for the planned leave.
22. The Respondent was not entitled to notice pay as his conduct amounted to gross misconduct that attracted a summary dismissal. He caused the end of his contract of employment. He caused the termination of his employment; the relief of notice pay could not be availed to him.
23. Since the termination of his employment did not occur on account of redundancy, the remedy of severance pay was wrongly sought by the Respondent.
24. In sum, the Respondent's claim was wanting in merit. The reliefs he sought were not warranted.

The Judgment of the lower court.

25. Upon hearing the parties on their respective cases, and considering their evidence and submissions, the Learned Trial Magistrate decided on the matter. He found for the Respondent, in the following terms;
 - a. A month's salary in lieu of notice..... KShs. 21,000.
 - b. Severance pay.....KShs. 85,200.
 - c. UnderpaymentKshs. 849, 132.00
 - d. Maximum compensation KShs. 255,600.
 - e. Certificate of service.
 - f. Costs
 - g. Interest.

The Appeal

26. Aggrieved with the Judgment, the Appellant impugned the same via the instant appeal, setting forth the following grounds;
 - I. That in awarding the Respondent one month's Notice pay amounting to kshs. 21,300 in lieu of payment, the learned magistrate erred in law by failing to take into account the fact that the claimant was not terminated.
 - II. That the learned magistrate erred in law and fact by awarding the claimant severance pay amounting to kshs. 85,200 despite termination not being on account of redundancy.



- III. That the learned magistrate erred in law and fact by awarding the respondent underpayment in the sum of kshs. 849, 132.00 despite the respondent being paid above the relevant wage bills as provided by Regulation of Wages of the prevailing wage order.
- IV. That the learned magistrate erred in law and in fact in failing to abide by the provisions of Section 90 of the Employment Act on limitation.
- V. That the learned magistrate erred in law and fact by failing to take into account the appellant's pleadings, sworn testimony and the respondent's own admission with respect to the fact the respondent's wages were calculated based on other area as the Appellant's premises are located in Kilifi County and not Mombasa County.
- VI. That without prejudice to the aforesaid, the Learned Magistrate erred in law and fact by awarding the claim in respect of underpayment in the sum of KShs. 849,132.00 despite the Respondent having abandoned the claim as submitted under Clause C of his Submissions dated 11th April, 2024 in respect of which claims the Claimant was seeking and entitled to.
- VII. That the Learned Magistrate erred in fact and in law by awarding the Respondent maximum compensation by failing to appreciate that the Respondent was the author of his own misfortunes by failing to report to work and refusing to provide contact details where the Claimant could be reached.
- VIII. That the Learned Magistrate erred in law and in fact by rewriting the contractual relationship between the Claimant and the Respondent and failing to consider that the Claimant was employed on a piece rate basis earning daily wages and was not entitled to a monthly salary and the one month's salary in lieu of notice.
- IX. That the Learned Magistrate failed to consider the due procedure followed by the Appellant on the absenteeism and gross misconduct and the notices issued as per the law.
- X. That the Learned Magistrate failed to consider the fact that the Respondent/Appellant reported the desertion of to the Labour Office.
- XI. That the Learned Magistrate erred in fact and in law by failing to take into account the evidence submitted which remained uncontroverted and the Appellant's cross-examination of the Respondent's witness to the effect that he never reported to the Appellant's premises.
- XII. That the Learned Magistrate erred in law and in fact by failing to appreciate that the Respondent's allegation on being dismissed was not supported.
- XIII. That the Learned Magistrate erred in law and in fact by awarding maximum compensation despite the Appellant stating that the Respondent was not issued with any termination letter and no evidence of any such termination was presented in Court.
- XIV. That the Learned Magistrate erred in law and in fact by awarding the respondent herein costs of the suit and failing to give any reasons for the same despite the matter having succeeded partially.
- XV. That the Learned Magistrate erred in law and in fact by relying solely on the evidence of the Respondent despite the contradictions in the documents adduced by the Respondent.



Analysis and Determination

27. I have carefully considered the over-split grounds of appeal set out in the memorandum of appeal herein, the parties' respective pleadings and evidence that were placed before the trial court, the Judgment of the lower Court, and the submissions by Counsel for the parties in this appeal, and that the appeal revolves around three major issues;
- I. What was the nature of the respondent's employment with the appellant?
 - II. How did the separation occur?
 - III. If the answer to [ii] above indicates that the termination was at the Appellant's initiative, was it fair?
 - IV. Was the Respondent entitled to the reliefs the Learned Trial Magistrate granted him?
28. Before I delve further into considering the issues, it is essential to point out that the role of a first appellate court is to re-evaluate the evidence before the lower court and draw independent conclusions. In the *German School Society & another v Ohany & another* [2023] KECA 894 [KLR], the Court of Appeal elaborately put it, thus;
- “A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on question of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions out forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellant court is the final court of ordinarily and therefore a litigant is entitled to a full fair, and independent consideration of the evidence at the appellant stage. In addition, we bear in mind that we, unlike the ELRC, we did not have the benefit of seeing testify [see *Kenya ports Authority v Kuston [Kenya] Limited*. [2009] 2EA 212].
29. Before the trial court, the parties took diametrically opposite positions regarding the nature of the employment contract under which the Respondent was serving at all material times. It was important for the Learned Trial Magistrate to address this point, as the rights and protections that the law accords to various categories of employees may differ. He rightly did it.
30. The Appellant's pleadings and the statement of its witness [turned evidence in chief], for unexplained reasons, didn't clearly convey the nature of the Respondent's employment at the material time. At one point, they describe him as a casual labourer, and at another as a piece rate worker. An employee can be a piece rate worker or casual, but cannot be both. This confusion regarding the description of the Respondent's form of employment might have been deliberate, considering the different rights employees enjoy under various types of employment contracts. Alternatively, it may have been inadvertent, stemming from a lack of differentiation between the two forms of employment. Regardless, it will soon be clarified that the Respondent's employment was term employment, not as labelled by the Appellant.
31. The *Employment Act* defines a casual employee as a person whose terms of engagement provide for payment at the end of each day and who is not engaged for more than twenty-four hours at a time. I have carefully considered the material presented to the Learned Trial Magistrate, and I am entirely unable



to believe that the Claimant's employment could fit the description of a casual employee engagement. The Spouts Foundry Duty Roasters, and the Daily in and out Reports, which were tendered in evidence, if anything, helped demonstrate that the Respondent was engaged more than twenty four [24] hours at a time. The Respondent's witness asserted that the Respondent could take his paid leave as and when it fell due. When one considers the structure of section 28 of the *Employment Act*, which provides the right to annual leave, it is easy to conclude that it doesn't contemplate casual employees as defined in section 2.

32. It is important to point out that piecework refers to any work for which the pay is determined by the amount of work performed, regardless of the time taken to complete it. The Appellant didn't provide any evidence that the Respondent's wages were calculated based on an amount that could be paid per spout. Their evidence only focused on daily pay, which was not shown to be directly influenced by the number of spouts produced in a given day.
33. At this point, it is imperative to state that employers should not be allowed to mislabel employees' form of engagement to undermine fair labour standards and the statutory rights and protections accorded to them. Further, employees under piece-rate arrangements are entitled to all statutory employment rights, including annual leave, rest days, sick leave, maternity and paternity leave and overtime compensation. See also Kenya Plantation and Agricultural Workers Union [KPAWU] vs. Kenya Nut Company Limited -ELRC Cause No. 532 of 2017.
34. Having said this, I hold that the employment arrangement between the Appellant and the Respondent was a term employment that would be terminable under section 35 of the *Employment Act*, by twenty-eight days' notice.
35. How then did the separation occur? No doubt there was no common cause. The Claimant asserted that his Supervisor told him that the management of the Appellant had decided to end his employment contract due to diminished work, whilst the Appellant contended that the Respondent had brought his employment to an end by his act of absconding from duty without authority and failing to report for duty.
36. Faced with these conflicting positions, the Learned Trial Magistrate correctly held that the termination was at the employer's initiative, the Appellant. The Appellant contended that the Respondent was sent on paid leave for 30 days due to operational exigencies and failed to show up for duty after these days had lapsed. I have reviewed the Appellant's pleadings and the witnesses' evidence and note that the 'operational exigencies' were not explained. In the circumstances of the matter, this generalised assertion cannot reasonably be taken as aiding the Appellant's case. Conversely, it fortifies the Respondent's contention that he was informed that his employment had ended due to diminished work.
37. The Supervisor was a crucial witness who could have been called to testify if the Appellant had hoped to discount the Respondent's version. The Appellant instead presented its Human Resource consultant, who, in my view, gave hearsay evidence on the issue.
38. The foregoing leads me to the inevitable conclusion that the Respondent's employment was verbally and summarily terminated.
39. Was the dismissal fair? I hold not. For a termination of an employee's employment or summary dismissal against an employee to be considered fair in terms of the law, it must be shown, that there was compliance with procedural fairness in the process leading to the decision to terminate or summarily dismiss, and that the decision was substantively justified. See also Pius Machafu Isindu v- Lavington Security Guards Limited [2017] eKLR.



40. Section 41 of the *Employment Act* provides the statutory procedure that the employer contemplating terminating an employee's employment must adhere to. The procedure embodies three components, and an absence of them or any of them, in the process leading up to the employer's decision to terminate, by operation of the law shall render the termination unfair by dint of section 45 of the Act. The components being that, the employer must notify the employee affected of their intention to terminate his or her employment and the grounds the basis thereof, allow the employee an adequate opportunity to make a representation on the grounds, accompanied by a colleague of choice, or a trade union representative if he is a member of a trade union, and consider the representations made before making a final decision on the matter. There is no doubt that the procedure wasn't adhered to.
41. Section 43 of the Act places a legal burden on the employer in a dispute regarding termination of an employee's employment to demonstrate the reason[s] for the termination; in the event of default, the termination shall be deemed unfair. Further, under section 45 of the Act, the employer must demonstrate that the reason[s] was fair and valid.
42. I note that the Appellant's evidence was all directed to demonstrate that the termination of the Respondent's employment was on account of his desertion on duty, a version which this Court has declined to accept. It follows, therefore, that the Appellant didn't demonstrate that the reason for the termination was fair and valid.
43. By reason of the foregoing premises, the Learned Trial Magistrate didn't err in finding that the dismissal was unfair.
44. The Appellant's Counsel submitted that the Respondent couldn't be entitled to notice pay as he caused the termination of his employment when he absconded from duty. Having found that he was unfairly dismissed, and that his employment was terminable by notice, which I hold was not issued, I see no reason to disturb the Learned Trial Magistrate's award of notice pay.
45. The Appellant assails the award of KShs. 849, 132.00 by the Learned trial Magistrate under the head, underpayments. It contended that the award was unjustified as it paid the Respondent above the relevant minimum wages at all material times. The Learned Trial Magistrate, in his judgment, stated that he had looked at the applicable Wage Order and agreed with the Respondent that he was underpaid. The Appellant's tenure covered a period when different Wage Orders were applicable. It was therefore necessary that he identify them elaborately, as a way of accountability for the award.
46. For purposes of the minimum wages, where an employee is stationed is a vital aspect. In this matter, the Appellant quit deliberately and appropriately pleaded that the Respondent's Station of work was Kilifi. The Respondent, therefore, could not apply the Mombasa rates to assert that he was underpaid. The fact that he was stationed in Kilifi wasn't rebutted.
47. I have carefully considered the various Wage Orders applicable to the years 2010, 2011, 2012, 2014, 2015, 2016, and 2017, as well as the fact that the Respondent was stationed at Kilifi. I hold that at all material times, his wages were paid in accordance with the relevant Wage Orders of the time; therefore, there was no underpayment that could justify a claim and an award under section 48 of the *Labour Institutions Act*.
48. Considering how the Respondent's employment was terminated, the Appellant's lack of candidness regarding the manner in which the separation occurred, the length of service of the Respondent, and the fact that he didn't in any proven manner contribute to termination of his employment, and conclude that there is no reason to disturb the Learned Trial Magistrate compensatory award under section 49[1][c] of the *Employment Act*, for unfair termination.



49. In conclusion, the Appellant's appeal succeeds. The trial court's award of KShs. 849,132.12 is set aside, as in the circumstances of this matter outlined above, he was not entitled to the remedy of underpayment.

50. Each part shall bear its own costs.

51. Orders accordingly.

READ, SIGNED AND DELIVERED THIS 8TH DAY OF MAY, 2025.

OCHARO KEBIRA

JUDGE

